PENGHUNI-PENGHUNI PREMIS TERSEBUT

v.

EUGENE AF DECRUZ & ANOR

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
SITI NORMA YAAKOB JCA
KC VOHRAH J
[CIVIL APPEAL NO: W-02-316-1994]

CIVIL PROCEDURE: *Action - Summary proceedings for possession of land - Rules of the High Court 1980, O. 89 - Affidavits - Admissibility*

The respondents in the instant appeal had purchased a house ('the house') from one Baskaran Govindan ('BG') in 1991. In 1993, the respondents were registered as the proprietors of the land on which the house was erected. As it transpired, BG failed to deliver vacant possession of the house and continued to occupy it until his demise in 1994. After BG's death, the respondents were still unable to take possession of the house as there were several unknown persons ('the appellants') in occupation of it. As a result, the respondents commenced proceedings for possession under O. 89 of the Rules of the High Court 1980 ('the RHC'). The judicial commissioner, after having accepted the respondents' affidavit and rejected the appellants' affidavit as inadmissible, ordered vacant possession in favour of the respondents. The appellants appealed. Before the instant court, the appellants contended that there was evidence that they were tenants of BG, ie, that they were tenants holding over.

Held:
Per KC Vohrah J

[1] The two documents that the appellants sought to rely upon in the instant appeal were exhibits that were referred to in their affidavit which had already been rejected in the court below. Consequently, the appellants could not rely on the said documents.

[2] The judicial commissioner had carefully considered the provisions of O. 89 of the RHC and the affidavit of the respondents and, therefore, was competent in making the order for vacant possession.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Responden-responden dalam rayuan semasa ini telah membeli sebuah rumah ('rumah tersebut') daripada seorang bernama Baskaran Govindan ('BG') pada tahun 1991. Pada tahun 1993, responden-responden telah didaftarkan sebagai tuanpunya tanah di atas yang mana rumah tersebut telah didirikan. Sepertimana yang berlaku, BG telah gagal untuk memberikan milikan kosong rumah tersebut dan telah terus menghuninya sehingga sehingga kematian beliau pada tahun 1994. Selepas kematian BG, responden-responden masih gagal mengambil milikan rumah tersebut kerana terdapat beberapa orang yang tidak dikenali ('perayu-perayu') yang menghuninya.

Akibatnya, responden-responden telah memulakan prosiding untuk mendapatkan milikan di bawah A. 89 Kaedah-kaedah Mahkamah Tinggi 1980 ('KMT'). Pesuruhjaya Kehakiman, setelah menerima afidavit responden-responden dan menolak afidavit perayu-perayu sebagai tidak boleh diterima masuk, telah memerintahkan milikan kosong bagi responden-responden. Perayu-perayu telah merayu. Di hadapan mahkamah semasa, perayu telah menegaskan bahawa terdapatnya keterangan bahawa mereka adalah penyewa-penyewa BG, iaitu mereka adalah tenant-tenant yang bertangguhan.

Diputuskan:
Oleh KC Vohrah H

[1] Kedua-dua dokumen yang perayu-perayu cuba untuk bergantung kepada dalam rayuan semasa ini adalah merupakan ekshibit-ekshibit yang telah dirujuk dalam afidavit mereka yang mana telah pun ditolak dalam mahkamah di bawah. Akibatnya, perayu tidak dapat bergantung ke atas dokumen-dokumen tersebut.

[2] Pesuruhjaya Kehakiman telah dengan teliti mempertimbangkan peruntukan-peruntukan A. 89 KMT dan afidavit responden-responden dan, dengan itu, adalah kompeten dalam membuat perintah untuk milikan kosong.

[Rayuan ditolak.]

Legislation referred to:
Rules of the High Court 1980, O. 89

[Appeal from High Court, Kuala Lumpur; Originating Summons No: S2-24-592-94]

For the appellants - M Kayveas; M/s Blanche Kayveas & Co
For the respondents - T Ramadas; M/s Siva, Ram & Assoc

Reported by Alex KC Lee

JUDGMENT

KC Vohrah J:

In 1991 Eugene a/l A.F. Decruz and his daughter (the plaintiffs) purchased a house from Baskaran a/l Govindan, so they narrated in their affidavit. Again, from the affidavit filed in support of their O. 89 application the following have been disclosed. About two years after the purchase of the property, on 2 April 1993, the plaintiffs were registered as proprietors of the land (H.S.(M) 7341, No. PT 12584 Batu 7, Jalan Batu Caves) on which the house stands.

Notwithstanding the plaintiffs' request, Baskaran failed to deliver vacant possession of the house as agreed in the sale and purchase agreement and the man continued to illegally occupy the house until he died on 19 January 1994. Before Baskaran passed away the plaintiffs issued a summons in the magistrate's court in Rawang for vacant possession of the house. That summons and Baskaran's counter-claim have since been struck out.

The plaintiffs attempted to take possession of the house after Baskaran's death. However, Baskaran's son Mohan who did not live there, refused to allow them entry into the house. At that time there were two unknown persons at the premises. A police report was made on the incident and on 16 April 1994 with police protection there was another attempt to take possession of the house but four unknown persons staying in the house, three of whom probably immigrants, refused to leave the premises. It was averred in the affidavit that the unknown individuals who occupied the premises had entered and occupied the premises without licence or consent.

When the matter came up for hearing before Abdul Kadir bin Musa JC (as he then was) on 20 September 1994 he ruled that the sole affidavit filed in opposition to the plaintiffs' affidavit, the affidavit of one B. Kumaran a/l Baskaran, was inadmissible. The learned Judicial Commissioner then ordered the defendants to deliver vacant possession to the plaintiffs within six months.

Although the defendants appealed against the whole of the decision of the learned Judicial Commissioner, before us, counsel for the appellants, Dato' Kayveas, abandoned the appeal against the rejection by the learned Judicial Commissioner of B. Kumaran's affidavit. He instead argued that there was evidence that the defendants were tenants of the premises, presumably meaning that they were tenants holding over. Dato' Kayveas made reference to two documents for his sole ground of appeal, one to para. 5 of a solicitor's letter (found at p. 114 of the Appeal Record) and the other to a purported tenancy agreement (found at p. 88 of the Appeal Record) that the defendants were

tenants of the late Baskaran. But both these documents are exhibits referred to in the affidavit of B. Kumaran which had been ruled inadmissible by the learned Judicial Commissioner and we fail to see how he could seek to rely on these exhibits.

ln the court below, Abdul Kadir JC had only the affidavit of the plaintiffs supporting the O. 89 application when he ordered vacant possession of the premises. In his written judgment the learned Judicial Commissioner considered various enclosures in the file pertaining to the case and concluded that the plaintiffs' application complied fully with the procedural requirements on service under O. 89 and he went on to state,

> Having so concluded, I am left only to ascertain whether or not the substantive part of the plaintiffs' application satisfied r. 1 of the said Order. Close perusal of the plaintiffs' affidavit in support of their application (encl. (2)) clearly shows that they were and are lawful owners of the material land with the building built thereon as reflected by paras. (1) to (3) of the said enclosure. Exhibit "A" to encl. (2) shows that both the plaintiffs are legal owners of the land by virtue of Sale and Purchase agreement dated 6 January 1991 exhibited as "B" to the same. I cannot find anything to justify me to conclude or draw any inference that any of the defendants was a tenant, either at the time of the plaintiffs' application or vacant possession or as a tenant holding over after the termination of any form of tenancy. This is more so, when there was no affidavit from any of the said defendants to show me otherwise. Thus I held that substantively that the plaintiffs' application was in order ...

Quite clearly the learned Judicial Commissioner had carefully considered O. 89 and the affidavit of the plaintiffs and it was competent for him to have made the order for vacant possession. We accordingly dismissed the appeal with costs and ordered the deposit in this appeal to go to the respondent to account of taxed costs.